

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALAN STROUD

Claimant

VS.

SEDGWICK COUNTY

Respondent

Self-Insured

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Docket No. 202,590

ORDER

On February 12, 1997, the application of both claimant and respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish on August 1, 1996, and an Award Nunc Pro Tunc entered on August 2, 1996, came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Terry J. Torline of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, E. L. Lee Kinch of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) The date of accident.

- (2) The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Award as modified by the Award Nunc Pro Tunc of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award as modified in the Award Nunc Pro Tunc of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

Claimant has alleged accidental injury on April 29, 1994; March 1, 1995; March 15, 1995; and each and every day through claimant's last day of work on July 25, 1995. The Administrative Law Judge found claimant had suffered accidental injury on April 29, 1994, with claimant's disability through the last date of employment being the result of claimant's April 1994 accident. The Appeals Board finds medical evidence supports this finding. While claimant did suffer additional minor symptom flair ups in March 1995 and through claimant's termination, the medical evidence does not support a finding that claimant suffered permanent injury on the later dates. Claimant's attempt to apply the bright line rule of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) to claimant's date of accident is not well received. While claimant alleges that his condition continued to worsen through his last date of employment on July 25, 1995, there is no medical evidence to support that allegation. The evidence indicates that while claimant's symptoms may have been worse, there was no evidence of repetitive injury trauma nor worsening of his impairment; unlike Berry, this was not a repetitive trauma case.

Therefore, it is the finding of the Appeals Board that the accident date of April 29, 1994, is appropriate and that finding is adopted by the Appeals Board in this matter.

With regard to the nature and extent of claimant's injury and/or disability, the Administrative Law Judge correctly adopted the tasks analysis of Dr. Robert Eyster, the treating physician in this matter. Dr. Eyster found claimant to have suffered a loss of 10 percent of his task performing abilities and, pursuant to K.S.A. 44-510e, would be entitled to a work disability in part based upon Dr. Eyster's opinion. It is also found that claimant has been unable to find employment and at the time of the regular hearing had a wage loss of 100 percent under the wage disability prong of K.S.A. 44-510e.

It appears from the record that claimant does retain the ability to earn wages in the open labor market. However, claimant was unemployed and suffered a 100 percent wage loss at the time of the regular hearing. The new language of K.S.A. 44-510e, as amended by the legislature in 1993, denies the Appeals Board the flexibility of adjusting the tasks and wage prongs of the statutes. The statute mandates that the loss of ability to perform work tasks be averaged together with the difference between the average weekly wage the worker was

earning at the time of the injury and the average weekly wage the worker is earning after the injury. As such the Appeals Board finds that the Administrative Law Judge, in his Award Nunc Pro Tunc, correctly computed this to represent a 55 percent permanent partial general body work disability.

The citing of Hughes v. Inland Container Corp., at 247 Kan. 407, 799 P.2d 1011 (1990), in the Award was inappropriate when taking into account the new work disability definition in K.S.A. 44-510e. In Hughes the Supreme Court found no justifiable reason for placing greater emphasis on one prong of the work disability statute than the other. With the current work disability limitations the Supreme Court would have no choice but to apply equally both prongs of the statute.

Therefore, in following the guidelines of the legislature, the Appeals Board finds claimant has suffered a 55 percent permanent partial general body work disability as a result of the injuries suffered on April 29, 1994.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated August 1, 1996, as amended by the Award Nunc Pro Tunc dated August 2, 1996, should be, and is hereby, affirmed and claimant, Alan Stroud, is granted an award against respondent, Sedgwick County, a qualified self-insured, for accidental injury sustained on April 29, 1994.

Claimant is entitled to 32.14 weeks temporary total disability compensation at the rate of \$313 per week totaling \$10,059.82, followed by 218.82 weeks permanent partial disability at the rate of \$313 per week totaling \$68,490.66 for a 55% permanent partial general body disability making a total award of \$78,550.48.

As of February 13, 1997, claimant would be entitled to 32.14 weeks temporary total disability compensation at the rate of \$313 per week totaling \$10,059.82, followed by 113.72 weeks permanent partial disability compensation at the rate of \$313 per week in the amount of \$35,594.36 totaling \$45,654.18 which ordered paid in one lump sum minus any amounts previously paid. Thereafter claimant is entitled to 105.1 weeks permanent partial disability compensation at the rate of \$313 per week totaling \$32,896.30 until fully paid or until further order of the Director.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of the Workers Compensation.

Claimant's contract for attorney fees is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of regular hearing	\$293.70
Barber & Associates	
Deposition of Francine Knight	\$261.00
Deposition of Pedro A. Murati, M.D.	\$206.80
Deposition of Karen Terrill	\$120.00
Deposition of Robert L. Eyster, M.D.	\$196.00
Deposition of Tom Glendenning	\$258.00
Deposition of Jerry Rummery	\$134.00
Deposition Services	
Transcript of regular hearing	\$168.90

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Torline, Wichita, KS
E. L. Lee Kinch, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director